

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

PRITIKIN, ET AL,) CV-09-3303-JF
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.)
) OCTOBER 30, 2009
COMERICA BANK, ET AL,)
)
DEFENDANT.) PAGES 1-24
)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEREMY FOGEL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: LAW OFFICES OF ROBERT LUBIN
BY: ROBERT LUBIN
JOSEPH CAMENZIND, IV
177 BOVET ROAD, STE 600
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FOR THE DEFENDANT: BUCHALTER NEMER
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(APPEARANCES CONTINUED ON THE NEXT PAGE)

OFFICIAL COURT REPORTER: SUMMER CLANTON, CSR, RPR
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FOR THE PLAINTIFF: LAW OFFICES OF KENNETH PRITIKIN
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SAN JOSE, CALIFORNIA

OCTOBER 30, 2009

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE
FOLLOWING PROCEEDINGS WERE HELD:)

THE COURT: PRITIKIN VERSUS COAMERICA
BANK.

MR. BERTRAN: GOOD MORNING, YOUR HONOR.
PETER BERTRAND AND RICK DARWIN APPEARING ON BEHALF
OF MOVANT COAMERICA BANK.

MR. LUBIN: I'M ROBERT LUBIN, YOUR HONOR,
FOR PRITIKIN.

MR. PRITIKIN: KENNETH PRITIKIN,
YOUR HONOR, FOR PRITIKIN.

THE COURT: GOOD MORNING, SIR.

MR. CAMENZIND: JOSEPH CAMENZIND FOR
PRITIKIN.

THE COURT: THANK YOU.

THERE WERE A LOT OF ISSUES AND SUB ISSUES
HERE. I'D LIKE TO FOCUS ON THE RICO EXCLUSION
BECAUSE I THINK IT MAY BE A DISPOSITIVE ISSUE AT
LEAST AS FAR AS FEDERAL JURISDICTION IS CONCERNED.

AND SINCE THAT'S THE ONLY FEDERAL CLAIM,
IT MAY WELL BE IF I'M PERSUADED BY THE DEFENDANTS
ON THAT POINT THAT I WOULD SIMPLY DISMISS THE
MATTER WITHOUT PREJUDICE AND PERMIT AN ACTION TO

1 STATE COURT.

2 THE LOGIC, IT SEEMS TO ME, OF THE RICO
3 EXCLUSION IS IT'S HARD TO OVERCOME. I NEED TO HEAR
4 MORE FROM PLAINTIFF ABOUT THIS.

5 A CLAIM OF SECURITIES FRAUD AGAINST THE
6 FRAUDSTERS THEMSELVES CLEARLY CANNOT BE ASSERTED
7 UNDER RICO, IT CAN BE ASSERTED UNDER THE PSLRA, AND
8 CONGRESS IS VERY CLEAR ABOUT THAT.

9 THE ROLE OF THE BANK IN THIS CASE IS
10 ALLEGED TO BE AN AIDER AND ABETTOR, BUT THE
11 PREDICATE ACT FOR PURPOSES OF RICO IS SECURITIES
12 FRAUD.

13 AND SO ESSENTIALLY WHAT'S BEING ARGUED IS
14 THIS, AS I UNDERSTAND IT: THE PEOPLE WHO ACTUALLY
15 COMMITTED THE FRAUD CANNOT BE SUED UNDER RICO AND
16 HAVE TO BE SUED UNDER THE PSLRA WITH ALL THE
17 PROCEDURAL REQUIREMENTS OF THAT STATUTE.

18 BUT PEOPLE WHO HELP THOSE PEOPLE VIOLATE
19 THE SECURITIES LAWS, WHICH ARGUABLY IS A LESS
20 ONEROUS ACT, CAN BE SUED UNDER RICO.

21 AND THE ARGUMENT IS: WELL, IF CENTRAL
22 BANK SAYS THAT YOU CAN'T SUE THE AIDERS AND
23 ABETTERS BUT THE PSLRA SAYS THERE'S NO RECOURSE
24 AGAINST THE AIDERS AND ABETTERS, THAT THERE HAS TO
25 BE -- THEREFORE, THERE HAS TO BE RECOURSE UNDER

1 RICO.

2 THAT SEEMS TO BE INCONSISTENT WITH WHAT
3 CONGRESS WAS TRYING TO DO. THEY WERE SAYING THAT
4 IF YOU VIOLATE SECURITIES LAWS, THERE IS A LIMITED
5 PRIVATE RIGHT OF ACTION UNDER THE PSLRA, BUT
6 BASICALLY WHAT WE WANT IS FOR THE SEC TO REGULATE
7 SECURITIES TRANSACTIONS.

8 AND IT SEEMS INCONSISTENT WITH THAT
9 LEGISLATIVE POLICY TO SAY THAT PEOPLE WHO ARE
10 SECONDARILY LIABLE FOR SECURITIES FRAUD, THAT THE
11 PRIVATE CITIZENS HAVE A GREATER RIGHT TO GO AFTER
12 THOSE PEOPLE UNDER THE RICO STATUTE.

13 SO I'M KIND OF -- AND THAT'S ESSENTIALLY
14 THE REASONING THAT THE COURTS THAT HAVE CONSIDERED
15 THIS ISSUE, INCLUDING THREE DISTRICT COURTS IN THE
16 NINTH CIRCUIT, HAVE ARRIVED AT.

17 SO I'M RELUCTANT TO TAKE THAT LEAP. AND
18 IT DOESN'T LEAVE THE PLAINTIFFS WITHOUT A REMEDY.
19 THEY HAVE ALL OF THEIR STATE LAW FRAUD CLAIMS AND
20 BREACH OF FIDUCIARY DUTY, BUT I THINK THE PLACE I'M
21 FOCUSING AT THE MOMENT IS ON RICO AND THE
22 SUBSTANCE OF THE RICO.

23 I THINK THERE ARE ALSO SOME PRETTY ROBUST
24 ISSUES HAVING TO DO WITH STATUTE OF LIMITATIONS AND
25 DISCOVERY, BUT I'M NOT SURE THOSE CAN BE RESOLVED

1 ON THE 12(B)(6) MOTION.

2 SO THAT'S KIND OF WHERE I'M AT AT THE
3 MOMENT. SO LET ME HEAR FROM PLAINTIFF'S COUNSEL
4 ABOUT THIS.

5 MR. LUBIN: YOUR HONOR, IN THE CASES THAT
6 DISCUSSED AIDING AND ABETTING, AND PREDICATE ACTS,
7 THE AIDING AND ABETTING WAS ACTUALLY SECURITIES
8 FRAUD.

9 FOR EXAMPLE, IN THE BANK CASES, THE BANK
10 ITSELF SOLD SECURITIES AND THEY PHONIED UP
11 DOCUMENTS TO SAY THAT THE SECURITIES WERE WORTH A
12 LOT MORE THAN THEY WERE.

13 IN OUR CASE THE PREDICATE ACTS HAVE
14 NOTHING AT ALL TO DO WITH SECURITIES LAW. THEY
15 HAVE TO DO WITH THE BANKING SCHEME

16 THE COURT: THE PREDICATE ACTS OF THE
17 BANK AS OPPOSED TO THE PREDICATE ACTS OF THE
18 WRONGDOERS, THE FRAUDSTERS, FOR LACK OF A BETTER
19 PHRASE.

20 MR. LUBIN: YES.

21 AND ALL OF THAT, THERE ISN'T ONE OF OUR
22 PLAINTIFFS THAT COULD HAVE SUED COAMERICA FOR
23 SECURITIES FRAUD. COAMERICA DIDN'T SELL
24 SECURITIES, THEY DIDN'T ADVERTISE SECURITIES.

25 THE COURT: I UNDERSTAND THAT, COUNSEL.

1 BUT CENTRAL BANK MAKES IT CLEAR THAT YOU CAN'T SUE
2 AIDERS AND ABETTORS FOR SECURITIES FRAUD UNDER THE
3 PSLRA, ANYWAY, SO YOU ARE RIGHT.

4 THEY COULDN'T SUE THEM UNDER THE
5 SECURITIES LAWS, BUT THAT DOESN'T MEAN THEY COULD
6 BE SUED UNDER RICO FOR HELPING SOMEONE ELSE VIOLATE
7 THE SECURITIES LAWS. THAT'S THE QUESTION.

8 MR. LUBIN: WELL, IF YOU LOOK AT THE
9 PSLRA, I BELIEVE THAT THE STATUTES -- CONGRESSIONAL
10 INTENT WAS TO PREVENT AIDERS AND ABETTORS WHO
11 PARTICIPATE IN THE SECURITIES VIOLATION, OTHERWISE
12 THIRD PARTY CREDITORS, FOR EXAMPLE, WOULD NOT HAVE
13 A CAUSE OF ACTION AGAINST THE BANK FOR VIOLATING A
14 RICO STATUTE. THEY WOULDN'T HAVE ANY REMEDY,
15 WHATSOEVER.

16 THE COURT: WELL, BUT THAT'S WHAT I'M
17 TRYING TO GET AT. I THINK YOUR CLIENTS DO HAVE A
18 REMEDY, ASSUMING THEY CAN GET AROUND THE TIME BARS
19 THAT HAVE BEEN RAISED AS TO ALL OF THE CLAIMS, BUT
20 THEY HAVE OTHER REMEDIES UNDER BANKING LAW, UNDER
21 COMMON LAW, IF THE CLAIMS ARE TIMELY THEY HAVE
22 CLAIMS AGAINST COAMERICA.

23 BUT THE ONLY QUESTION I'M FOCUSSED ON,
24 BECAUSE IT'S ONE THAT GOES TO FEDERAL JURISDICTION,
25 IS WHETHER THEY HAVE A RICO CLAIM.

1 AND CONGRESS WAS TRYING TO LIMIT THE
2 APPLICATION OF RICO TO SECURITIES FRAUDS SCHEMES, I
3 MEAN, IT'S CLEARLY WHAT THEY WERE DOING.

4 SO THE QUESTION IS: DOES IT SWEEP IN
5 PEOPLE WHO HELP PEOPLE COMMIT SECURITIES FRAUD
6 SCHEMES AS WELL AS THE PEOPLE WHO COMMIT THE FRAUD
7 THEMSELVES?

8 IF YOUR CLIENTS WOULD HAVE NO REMEDY AT
9 ALL, I THINK IT WOULD BE A MUCH HARDER CASE. I
10 DON'T THINK CONGRESS WAS INTENDING TO DO THAT.
11 THEY WERE JUST SAYING YOU CAN'T USE THE RICO
12 STATUTE TO, ESSENTIALLY, ENFORCE THE SECURITIES
13 LAWS.

14 AND IT'S TRUE THAT THERE'S NO SECURITIES
15 FRAUD CLAIMS AGAINST COAMERICA, I UNDERSTAND THAT.
16 BUT WHAT COAMERICA IS ACCUSED OF DOING IN THE RICO
17 COUNT THAT YOU HAVE IS HELPING THE BAD GUYS VIOLATE
18 THE SECURITIES LAWS.

19 AND I THINK THAT'S WHERE I'M STUCK. I
20 MEAN, IT'S JUST A QUESTION OF HOW BROADLY OR HOW
21 NARROWLY THAT -- YOU ARE SAYING -- IF I ADOPT YOUR
22 POSITION YOU ARE SAYING THAT A PRIVATE CITIZEN HAS
23 GREATER RIGHTS AGAINST THE AIDER AND ABETTOR THAN
24 THEY DO AGAINST THE PEOPLE WHO COMMIT THE FRAUD, AT
25 LEAST UNDER RICO.

1 MR. LUBIN: YOUR HONOR, IN OUR CASE THE
2 ONLY THING THE BANK DID WAS ENTER INTO THE BANKING
3 SCHEME. AND THE BANKING SCHEME HAD NOTHING AT ALL
4 TO DO WITH VIOLATION OF SECURITIES LAWS.

5 THE COURT: OKAY.

6 SO YOU ARE SAYING THAT THE RICO
7 CONSPIRACY HAD NOTHING TO DO WITH THE VIOLATION OF
8 SECURITIES LAWS, IT HAD TO DO WITH A BANKING
9 ARRANGEMENT?

10 MR. LUBIN: THAT'S CORRECT, YOUR HONOR.

11 THE COURT: BUT THE PURPOSE OF THE
12 BANKING ARRANGEMENT WAS TO ENABLE THE FOUR STAR
13 PEOPLE TO DEFRAUD YOUR CLIENTS IN THE SALE OF
14 SECURITIES.

15 MR. LUBIN: THAT'S CORRECT.

16 MR. PRITIKIN: YOUR HONOR, IF I COULD
17 MAKE A POINT. TWO POINTS.

18 FIRST OF ALL, YOU CAN HAVE A SCHEME THAT,
19 STANDING ALONE, MEETS THE DEFINITION OF ENTERPRISE
20 UNDER ODOM. AND THAT SCHEME MAY NOT INVOLVE
21 SECURITIES FRAUD. THE BANKING SCHEME MEETS THE
22 DEFINITION OF AN ENTERPRISE STANDING A LONE UNDER
23 ODOM. IT'S A RACKETEERING ENTERPRISE IF YOU
24 FUNCTION AS A UNIT, ALL OF THOSE ELEMENTS.

25 YOU ARE SAYING WELL, YES, THE BANKING

1 SCHEME, THE PURPOSE OF IT WAS TO HELP THE
2 SECURITIES FRAUD THAT WAS GOING ON OVER THERE. AND
3 THAT'S TRUE; WE DON'T DENY THAT.

4 THE QUESTION IS WHETHER CONGRESS IN
5 ENACTING THE PSLRA INTENDED THAT RESULT.

6 LET ME GIVE YOU AN EXAMPLE. COUNSEL
7 SUGGESTED THAT FOUR STARS' CREDITORS WOULD BE
8 UNABLE TO PURSUE A RICO CLAIM. LET ME GIVE A MORE
9 DRAMATIC EXAMPLE, IF I MIGHT.

10 SUPPOSE YOU HAD A GROUP OF PEOPLE WHO GOT
11 TOGETHER AND DECIDED THAT THEY WERE GOING TO KIDNAP
12 THE CHILDREN OF WEALTHY PEOPLE TO GET RANSOMS AND
13 THAT'S ALL THEY WERE INVOLVED IN, KIDNAP FOR
14 RANSOM.

15 BUT THEN THEY TOOK THE MONEY AND THEY
16 USED IT OR GAVE IT TO SOMEONE ELSE WHO THEN USED IT
17 TO PERPETRATE A SECURITIES FRAUD SCHEME, SO THEY
18 WERE TIED TOGETHER.

19 AND THE SUGGESTION HERE IS THAT, WELL,
20 THE PEOPLE WHO THEIR ONLY INVOLVEMENT WAS THE
21 KIDNAPPING AND THEY DID THIS FOR YEARS, THEY
22 COULDN'T BE CHARGED BECAUSE THERE WAS A RELATION TO
23 A SECURITIES FRAUD.

24 THE COURT: THAT'S A GOOD ARGUMENT, BUT I
25 THINK HERE'S WHERE I'M NOT SURE IT WORKS.

1 THE KIDNAPPING IS INDEPENDENTLY WRONGFUL.
2 YOU DON'T WANT PEOPLE RUNNING AROUND KIDNAPPING
3 PEOPLE FOR RANSOM.

4 WHAT WAS WRONGFUL ABOUT THE BANKING
5 SCHEME? THINGS WERE DONE TO DECEIVE DEPOSITORS AND
6 SO FORTH. BUT WHAT MAKES THE -- EVEN IF YOU MEET
7 THE ENTERPRISE REQUIREMENT, WHICH I THINK YOU
8 PROBABLY DO, WHAT IS THE CORRUPT PURPOSE OF THE
9 ENTERPRISE OTHER THAN TO BE PART OF THIS SECURITIES
10 FRAUD SCHEME?

11 MR. PRITIKIN: TO DEFRAUD CREDITORS. THE
12 PURPOSE OF THE BANKING SCHEME WAS THAT FOUR STAR
13 HAD FUNDS IN AN ACCOUNT THAT THEY NEEDED TO HAVE
14 ACCESSIBLE TO PAYCHECKS TO ITS INVESTORS AND PAY
15 OTHER EXPENSES OF THE OPERATION.

16 BUT IF THEY DID NOTHING OTHER THAN ACT
17 LEGITIMATELY, FOUR STARS' CREDITORS WITH MULTI
18 MILLION DOLLAR WRITS OF EXECUTION AND PREJUDGMENT
19 WRITS OF ATTACHMENT WOULD HAVE ATTACHED THOSE
20 FUNDS. THERE WOULD HAVE BEEN NO ABILITY TO DO THAT
21 AND THE OPERATION WOULD SHUT DOWN.

22 SO FOUR STAR AND COAMERICA COOKED UP A
23 SCHEME TO KEEP THE FUNDS AWAY FROM THESE CREDITORS.
24 THEY DID IT THROUGH AN ELABORATE SHELL GAME OF
25 MOVING THE FUNDS BACK AND FORTH TO DEFRAUD THE

1 CREDITORS. SO THIS IS A VIOLATION OF THE
2 CALIFORNIA FRAUDULENT PRACTICES ACT.

3 IN ADDITION, THE CONDUCT IN AND OF ITSELF
4 VIOLATED, WE'VE ALLEGED IN THE COMPLAINT, FEDERAL
5 BANKING REGULATIONS, ORDINARY BANKING PRACTICES AND
6 COAMERICA'S OWN INTERNAL PROCEDURES.

7 SO THIS WAS THE PRACTICE THAT WAS
8 EXTREMELY UNORTHODOX DESIGNED TO KEEP FUNDS AWAY
9 FROM THE CREDITORS WHO WERE ENTITLED TO THEM.

10 THE COURT: WHICH IS PART OF THE
11 SECURITIES FRAUD SCHEME.

12 YOUR KIDNAPPING ANALOGY IS ONE THAT I
13 WOULD LIKE TO GET DEFENDANTS TO RESPOND TO.

14 BUT THE SCHEME IN THIS CASE IS TO, AND
15 IT'S A PONZI SCHEME, THAT'S WHAT'S ALLEGED. AND
16 THE WAY THAT THE INVESTORS ARE KEPT IN THE DARK IS
17 BY MONEY BEING MOVED AROUND IN THE WAY YOU JUST
18 DESCRIBED, BUT THAT'S ALL IN AID OF THE PONZI
19 SCHEME.

20 YOU COULD PROBABLY BREAK ANYTHING DOWN TO
21 AN ATOMIC LEVEL IF YOU WANTED TO. THE QUESTION IS
22 HOW INTERTWINED ARE THE ACTS OF THE BANK AND THE
23 ALLEGED SECURITIES FRAUD SCHEME?

24 MR. PRITIKIN: THE SECOND POINT I WOULD
25 LIKE TO MAKE, AND THIS GOES TO THE QUESTION OF

1 BREAKING IT DOWN TO THIS ATOMIC LEVEL YOU TALKED
2 ABOUT, WHAT ARE THE PREDICATE ACTS HERE?

3 I THINK THAT'S THE KEY BECAUSE I HAVEN'T
4 SEEN THE NINTH CIRCUIT CASE THAT IS DIRECTLY ON
5 POINT HERE, BUT THE *BALD EAGLE CASE WHICH IS THIRD
6 CIRCUIT SAID THE PURPOSE OF THE PSLRA AMENDMENT OF
7 THE RICO STATUTE WAS TO EXCLUDE CONDUCT WHICH AS A
8 PREDICATE WOULD BE RELIED UPON AS A PREDICATE ACT
9 FOR RICO WHERE THAT CONDUCT IS ACTIONABLE
10 SECURITIES FRAUD.

11 AND SO YOU DO LOOK AT THE PREDICATE ACT.
12 AND HERE THE PREDICATE ACTS THAT ARE ALLEGED IN
13 SUPPORT OF THE RICO CLAIM AGAINST COAMERICA IS THE
14 WIRE FRAUD AND THE VIOLATION OF LAW, OF FEDERAL
15 LAW, THAT COAMERICA DID. NONE OF THOSE PREDICATE
16 ACTS STANDING ALONE INVOLVE CONDUCT WHICH WOULD BE
17 ACTIONABLE SECURITIES FRAUD.

18 SO I THINK THE REAL QUESTION IS WHEN YOU
19 LOOK AT PSLRA AMENDMENT AND IT SAYS THAT A
20 PLAINTIFF CANNOT RELY ON CONDUCT THAT WOULD BE
21 ACTIONABLE SECURITIES FRAUD TO SUPPORT TO ESTABLISH
22 A RICO CLAIM, WHOSE CONDUCT ARE WE TALKING ABOUT?
23 AND I DON'T KNOW THAT THE STATUTE IS CLEAR. BUT IF
24 YOU LOOK AT CONGRESSIONAL INTENT, IT TELLS YOU
25 EXACTLY WHAT THEY ARE TALKING ABOUT.

1 THE HOUSE CONFERENCE COMMITTEE REPORT
2 SAYS THAT WHAT THEY'RE CONCERNED ABOUT IS
3 SECURITIES FRAUD DEFENDANTS WHO HAVE TO FACE THIS
4 TRIPLE BLUNDER, SINCE THE COURT TALKED ABOUT IT, OF
5 RICO.

6 THEY ARE ALREADY SUBJECT TO SECURITIES
7 FRAUD REMEDIES, THEY SHOULDN'T BE -- IT'S UNFAIR,
8 THAT WAS THE TERM USED IN THE HOUSE COMMITTEE
9 REPORT AND THAT WAS THE TERM USED WHEN THE SEC
10 CHAIRMAN TESTIFIED BEFORE CONGRESS, IT'S UNFAIR TO
11 SUBJECT THESE PEOPLE WHO ALREADY HAVE SECURITIES
12 FRAUD REMEDIES AGAINST THEM TO ALSO HAVE RICO
13 REMEDIES.

14 BUT THAT'S NOT THE CASE HERE. AND THAT
15 GOES TO THE QUESTION OF WHAT DID CONGRESS MEAN WHEN
16 THEY TALKED ABOUT YOU SHOULD NOT RELY ON CONDUCT.
17 WHOSE CONDUCT?

18 THE COURT: THANK YOU.

19 THAT'S VERY HELPFUL. LET ME GET A
20 RESPONSE FROM DEFENDANTS.

21 MR. BERTRAND: THANK YOU, YOUR HONOR.
22 PETER BERTRAND ON BEHALF OF COAMERICA BANK.

23 I THINK YOUR HONOR HIT THE NAIL ON THE
24 HEAD WHEN YOU NOTED THE HARM THAT'S BEING ALLEGED
25 IS BASED UPON SECURITIES FRAUD.

1 AND THE THOMAS H. LEE EQUITY FUND CASE
2 DIRECTLY ADDRESSED IT.

3 THE COURT: THAT'S THE NEW YORK CASE?

4 MR. BERTRAND: THAT'S CORRECT,
5 YOUR HONOR.

6 AND THERE ARE A NUMBER OF OTHER CASES
7 THAT HAVE COME DOWN THE EXACT SAME WAY, AND THAT IS
8 YOU DON'T HAVE TO SHOW THAT THE DEFENDANT YOU ARE
9 SUING IS THE PERPETRATOR OF A SECURITIES FRAUD
10 THAT'S AT THE BASIS OF THE CLAIM IS SECURITIES
11 FRAUD.

12 THE PLAINTIFFS HAVE NO CLAIM AGAINST
13 COAMERICA BANK WITH RESPECT TO THEIR HAVING
14 RECEIVED PAYMENTS OUT OF THE FOUR STAR ACCOUNTS,
15 THEIR CLAIMS ARE AIDING AND ABETTING FRAUD.

16 THE COURT: ALL RIGHT. LET ME REPHRASE
17 THAT AND MAKE SURE I UNDERSTAND YOU.

18 THE PLAINTIFF WOULD NOT HAVE A CLAIM FOR
19 DAMAGES AGAINST COMERICA IF THERE HADN'T BEEN A
20 SECURITIES FRAUD. SECURITIES FRAUD IS THE BUT FOR.

21 IT MAY BE THAT THE ALLEGATIONS ARE
22 SUFFICIENT TO STATE THAT COAMERICA VIOLATED THIS
23 AND THAT BANKING CODE AND THIS AND THAT STANDARD OF
24 PRACTICE, BUT PLAINTIFFS WOULDN'T HAVE STANDING TO
25 COMPLAIN ABOUT THAT IF THEY HADN'T BEEN THE VICTIMS

1 OF THE PONZI SCHEME.

2 MR. BERTRAND: THAT'S EXACTLY RIGHT. IT
3 GOES RIGHT TO THE HEART OF IT.

4 AND AS YOUR HONOR HAS NOTED, THE RESULT
5 OF SOMEBODY WHO'S MERELY ALLEGED TO BE AN AIDER AND
6 ABETTOR HAS GREATER LIABILITY THAN A PRIMARY
7 PERPETRATOR MAKES NO SENSE AND THE COURTS HAVE
8 KNOCKED THAT ISSUE DOWN.

9 THE COURT: WHAT ABOUT MR. PRITIKIN'S
10 KIDNAPPER ANALOGY?

11 ARE THERE THINGS SO CORRUPT IN AND OF
12 THEMSELVES THAT THERE OUGHT TO BE RICO LIABILITIES?
13 DOES IT GO BACK TO THE STANDING DISCUSSION WE JUST
14 HAD?

15 MR. BERTRAND: I THINK IT DOES,
16 YOUR HONOR.

17 NUMBER ONE, IF YOU LOOK AT THE ACTUAL
18 ALLEGATIONS, THEY DON'T EVEN ALLEGE THAT COAMERICA
19 HAD KNOWLEDGE OF THE PONZI SCHEME. THEIR
20 ALLEGATIONS ARE MERELY THAT COAMERICA WAS A
21 DEPOSITORY BANK OR AN INSOLVENT ACCOUNT HOLDER WHO
22 CHOSE TO PAY ONE GROUP OF CREDITORS OVER ANOTHER
23 GROUP OF CREDITORS.

24 NOW HOW THAT RENDERS A BANK LIABLE FOR
25 \$50 MILLION TO PEOPLE THAT IT HAS NO CONNECTION

1 WITH WHATSOEVER MAKES NO SENSE AT ALL. THE CASEY
2 CASE ADDRESSED THAT ABSOLUTELY, SPECIFICALLY.

3 THEY ARE NOT THE BENEFICIARIES, THEY
4 DON'T GET TO COME IN AND SAY, WE THINK THEY
5 VIOLATED BANK POLICY, THEREFORE WE AS
6 NON-DEPOSITORS HAVE SOME RIGHTS AGAINST THE BANK OR
7 A BANK HAS TO BE A WATCHDOG OR POLICEMAN WITH
8 RESPECT TO ACCOUNTS.

9 THAT'S NOT WHAT THE LAW IS, AND THE CASES
10 ARE CLEAR ON THAT.

11 WE DON'T EVEN OWE FIDUCIARY DUTIES TO OUR
12 DEPOSITORS. HOW COULD WE POSSIBLY HAVE THESE
13 DUTIES EXTENDED TO INVESTORS OF DEPOSITORS. IT
14 MAKES NO SENSE, WHATSOEVER.

15 I'D LIKE TO ADDRESS ONE LAST THING. I
16 KNOW YOU ARE VERY TIGHT ON TIME, BUT I WOULD LIKE
17 TO SUGGEST TO YOUR HONOR THAT I BELIEVE THE RICO
18 CLAIM CLEARLY HAS TO BE DISMISSED, BUT I THINK THAT
19 DISMISSAL OF ALL OF THE CLAIMS IS APPROPRIATE.

20 THE COURT: BECAUSE OF THE TIME BAR?

21 MR. BERTRAND: CORRECT, YOUR HONOR.

22 AND YOU KNOW, YOU CAN DISMISS THE RICO
23 CLAIM AND THEY CAN GO FILE IN STATE COURT AND WE
24 MAY VERY WELL BE BACK HERE WITH THESE CLAIMS UNDER
25 DIVERSITY JURISDICTION ISSUES.

1 SO I'M JUST SUGGESTING AT THIS POINT THAT
2 I THINK THAT THE CLAIMS ARE CLEARLY TIME BARRED AND
3 THAT THE ARGUMENTS REALLY COME DOWN TO, WELL, WE
4 DIDN'T KNOW ABOUT COAMERICA.

5 WELL, THAT'S NOT THE TEST AND THAT'S NOT
6 THE TEST UNDER JOLLY AND BERNSON AND NORGART AND
7 FOX, AND THE SHEPARD MULLEN CASE.

8 AND THEY ALSO HAD A DUTY OF DILIGENCE,
9 AND THERE IS NOT ONE WORD IN THEIR COMPLAINT ABOUT
10 ANY DILIGENCE THAT THEY EXERCISED AT ALL.

11 THE COURT: THEY KNEW BANKS WERE INVOLVED
12 IN THE SUITS THAT WERE FILED IN '03 AND '04, THEY
13 JUST DIDN'T NAME YOUR CLIENT.

14 MR. BERTRAND: THAT'S CORRECT,
15 YOUR HONOR.

16 ONE POINT I WOULD MAKE, AND WE MAKE IN
17 THE PAPERS, BUT I REALLY WANT TO EMPHASIZE IT.
18 EVEN THOUGH THEY FILED LAWSUITS AND THEY COULD HAVE
19 NAMED COAMERICA AS A DOE AND THEY COULD HAVE TAKEN
20 DISCOVERY, THE FACT THERE WAS BANKRUPTCIES FILED BY
21 FOUR STAR, ANSON AND GARRETT MEANT THEY DIDN'T EVEN
22 HAVE TO FILE A LAWSUIT.

23 UNDER RULE 2004, ALL THEY HAD TO DO WAS
24 GO INTO ANY ONE OF THOSE BANKRUPTCY PROCEEDINGS AND
25 FILE A REQUEST FOR DOCUMENTS AND FILE AND REQUEST

1 TO EXAMINE A BANK EMPLOYEE, AND THEY COULD HAVE
2 GOTTEN WHATEVER INFORMATION THEY CLAIM WAS NOT
3 OTHERWISE AVAILABLE TO THEM EVEN THOUGH THE ANSON
4 AND GARRETT LINE OF CREDIT AND PAYMENTS TO THE BANK
5 FROM FOUR STAR ACCOUNTS AND THE MOVING OF MONEY WAS
6 CLEARLY KNOWN. THAT'S ALL THEY HAD TO DO AND THEY
7 DIDN'T.

8 AND AS BERNSON TELLS US, YOU KNOW, THE
9 TEST IS, DID THEY VIGOROUSLY PURSUE AVENUES? THEY
10 DIDN'T.

11 AND THE FACT THAT THEY HAD NINE MONTHS TO
12 BRING THIS COMPLAINT AND FAILED TO ALLEGE A SINGLE
13 ITEM OF DUE DILIGENCE, THEY DID IT WITH RESPECT TO
14 THE CLAIMS, PARTICULARLY GIVEN WHAT'S IN THE PUBLIC
15 RECORD, I THINK ALL THEIR CLAIMS MUST BE DISMISSED.

16 THE COURT: OKAY. ALL RIGHT.

17 A BRIEF REPLY, PLEASE.

18 MR. LUBIN: YES, YOUR HONOR.

19 THERE'S NOTHING IN THE PUBLIC RECORD
20 WHATSOEVER WHICH WOULD HAVE PUT A PLAINTIFF ON
21 NOTICE OR SUSPICION OF A RICO CLAIM AGAINST
22 COAMERICA.

23 THE COURT: WHAT ABOUT THE OTHER CLAIMS,
24 THOUGH?

25 WHAT COUNSEL IS SAYING IS THAT YOUR

1 CLIENTS ARE FILING INDIVIDUAL LAWSUITS AGAINST THE
2 PRIMARY WRONGDOERS, AND IN THAT THEY ALLEGE THE USE
3 OF BANKS TO CARRY OUT THE SCHEME.

4 SO WHAT ABOUT THE ARGUMENT THAT BASED ON
5 WHAT'S IN THE PUBLIC RECORD, THE COURT SHOULD FIND
6 THAT AT SOME POINT THEY SHOULD HAVE FIGURED OUT
7 WHICH BANKS THEY WERE?

8 MR. LUBIN: YES, YOUR HONOR.

9 THE ONLY BANK THAT WAS INVOLVED WAS
10 RESERVOIR CAPITAL FIRST CHARTER.

11 AND IN THAT CASE, THE FIRST CHARTER
12 ATTORNEYS DIDN'T SUE ANY OTHER BANK EVEN THOUGH
13 THEY HAD KNOWLEDGE THAT OTHER BANKS WERE AROUND.

14 AND IF THE ATTORNEYS WHO HANDLED THAT
15 CASE, WE ASSUME THEY DID THEIR DUE DILIGENCE, WOULD
16 OBJECT TO OTHER BANKS. THE BANKS, AS COUNSEL SAYS,
17 WERE IN THE BANKRUPTCY RECORDS, THERE ARE FIVE
18 DIFFERENT COUNTS. BUT NOTHING IN THAT CASE
19 SUGGESTS THAT THE PLAINTIFFS WOULD HAVE BEEN ON
20 NOTICE.

21 IN 2002 OR 2003, WHO COULD HAVE IMAGINED
22 A BANK BEING INVOLVED IN A PONZI SCHEME? IT JUST
23 COULDN'T HAPPEN.

24 THE COURT: WELL, BUT APPARENTLY IT DID.

25 MR. LUBIN: APPARENTLY IT DID WITH ONE

1 BANK, BUT THERE WERE A NUMBER OF BANKS THAT WERE
2 LISTED.

3 AND IF THE PLAINTIFFS IN THE BANK CASE OR
4 THEIR ATTORNEYS -- THEY KNEW ABOUT COAMERICA.
5 THERE IS A CERTAIN -- MR. WAY, *STEVEN WAY WHO WAS
6 ON THE BOARD OF DIRECTORS OF THE BANK THAT WAS
7 SUED, AND HE WAS AN OFFICER OF COAMERICA, A -- OF
8 FOUR STAR.

9 AND CERTAINLY, IF THE ATTORNEY KNEW THAT
10 HE WAS AN OFFICER OF FOUR STAR HE WOULD HAVE DONE
11 THAT INVESTIGATION AND COME UP WITH NOTHING.

12 THE COURT: OKAY. ALL RIGHT.

13 MR. PRITIKIN: YOUR HONOR, MAY I BRIEFLY?

14 THE COURT: AGAIN, I NEED TO REMIND
15 EVERYONE THERE ARE OTHER CASES.

16 MR. PRITIKIN: YOUR HONOR, WITH REGARD TO
17 THE ISSUE OF DILIGENCE, THE LAW IS CLEAR THAT
18 PLAINTIFF ISN'T REQUIRED TO DO A FUTILITY ACT. THE
19 QUESTION IS: WOULD IT HAVE BEEN FUTILE TO
20 INVESTIGATE THE RECORDS, THE PUBLIC RECORDS?

21 COAMERICA ARGUES ON THE ONE HAND THAT
22 PLAINTIFFS SHOULD HAVE LOOKED AT THE RECORDS THAT
23 WERE AVAILABLE, BUT THEY ARGUE EQUALLY STRENUOUSLY
24 THERE'S NOTHING IN THE RECORDS THAT SUGGEST
25 ANYTHING OTHER THAN LEGITIMATE BANKING

1 TRANSACTIONS.

2 AND THEY CAN'T HAVE IT BOTH WAYS. THE
3 FACT OF THE MATTER IS THE BANKING SCHEME ALLEGED IN
4 OUR COMPLAINT WAS SO SOPHISTICATED THAT IF YOU
5 LOOKED AT THE BANK STATEMENTS THEY WOULD LOOK LIKE
6 BANKING TRANSACTIONS, OVERDRAFTS, THINGS THAT BANKS
7 DO ALL THE TIME.

8 IT WAS THE CONSPIRACY THAT MADE IT
9 IMPROPER, AND ONLY THE CONSPIRATORS KNEW THE
10 CONSPIRACY. ONE OF THE CONSPIRATORS HAD TO BREAK
11 IN ORDER FOR PEOPLE TO KNOW WHAT WAS GOING ON. AND
12 IN 2008 ONE OF THE CONSPIRATORS, MARK COHN, DID
13 BREAK.

14 WITH REGARD TO THE STATUTE OF
15 LIMITATIONS, AGAIN, JUST REALLY BRIEFLY. FOX AND
16 GRISHAM AND THE E-FAB CASES THAT WE'VE CITED ALL
17 STEM FROM THE PROPOSITION YOU MAY KNOW THAT YOU
18 HAVE BEEN HARMED AND THE HARM WAS PROBABLY DUE TO
19 SOMEBODY'S WRONGDOING.

20 BUT IF THERE'S A SEPARATE CAUSE OF ACTION
21 THAT INVOLVES A DIFFERENT SET OF FACTS THAT UNLESS
22 YOU EITHER KNOW THOSE FACTS OR HAVE REASON TO
23 SUSPECT THOSE FACTS, THE STATUTE OF LIMITATIONS
24 HASN'T STARTED IN THOSE FACTS.

25 WITH FOX IT WAS A DIFFERENT TYPE OF

1 WRONGDOING. WITH E-FAB IT WAS A DIFFERENT TYPE OF
2 WRONGDOING. BUT WITH GRISHAM THE WRONGDOING WAS
3 THE SAME. WELL, WHAT WAS DIFFERENT WAS THE TYPE OF
4 HARM, ECONOMIC HARM VERSUS PHYSICAL HARM.

5 SO THE ISSUE IS: IS THERE AN ELEMENT OF
6 THAT SECOND CAUSE OF ACTION, AN ESSENTIAL ELEMENT
7 WHICH YOU HAVE NO REASON TO SUSPECT THE FACTS?

8 THE COURT: IT'S EVEN MORE BASIC THAN
9 THAT. AND THAT IS: IS THERE AN ISSUE OF FACT AS
10 TO WHAT PLAINTIFF SHOULD HAVE KNOWN?

11 MR. PRITIKIN: SURE.

12 THE COURT: I HAVE TO STOP.

13 MATTER IS SUBMITTED. I WILL GET A RULING
14 OUT TO YOU VERY SOON.

15 THANK YOU VERY MUCH.

16 (WHEREUPON, THE PROCEEDINGS IN THIS
17 MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

SUMMER A. CLANTON, CSR, RPR
CERTIFICATE NUMBER 13185